No. 229

In the Supreme Court of the United States

OCTOBER TERM, 1951

WARREN H. PILLSBURY AND ALBERT J. COX, DEPUTY COMMISSIONERS FOR THE THIRTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, ET AL., PETITIONERS,

v.

UNITED ENGINEERING COMPANY, A CORPORATION, FIREMEN'S FUND INSURANCE COMPANY, A CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division (JR. 15; CR. 15; SR. 14; MR. 15) is reported at 92 F. Supp. 898.[1] The opinion of the

[1] Because of the existence of a question of law common to each of the four cases, they were consolidated both for trial and on appeal, and all four cases were dealt with in single

United States Court of Appeals for the Ninth Circuit (JR. 44; CR. 70; SR. 42; MR. 56) is reported at 187 F. 2d 987.

JURISDICTION

The judgments of the Court of Appeals were entered on March 14, 1951 (JR. 48; CR. 74; SR. 46; MR. 60). By order of Mr. Justice Black, dated June 7, 1951, the time for applying for certiorari was extended to and including August 11, 1951. The petition for a writ of certiorari was filed on August 7, 1951, and was granted on October 15, 1951. (JR. 53; CR. 79; SR. 51; MR. 65). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the one-year period of limitation upon the filing of claims for compensation for disability under the Longshoremen's and Harbor Workers' Compensation Act, prescribed by Section 13(a) of that Act, begins at the time of the accident, or only when a compensable injury accrues.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, are set out in the Appendix, *infra*, pp. 56-61. Section 13(a)

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opinions both in the District Court and the Court of Appeals. For convenience, the records in Nos. 12644, 12645, 12646, and 12647 below are hereinafter respectively referred to as JR, CR, SR, and MR—the letters preceding the letter "R" being the first initial of the surnames of each of the claimants.

of that Act, 33 U.S.C. 913, which is most immediately involved, provides as follows:

> The right to compensation for disabilty under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

STATEMENT

In these four consolidated cases, the plaintiff employers and their respective insurance carriers (respondents herein) seek to set aside and enjoin the enforcement of Compensation Orders and Awards made by the Deputy Commissioners (petitioners herein) pursuant to the Longshoremen's and Harbor Workers' Compensation Act, *supra*. In each case, respondents' sole contention is that the Deputy Commissioner lacked jurisdiction to make the award because the claim for compensation was not filed within a year after the accident in which the claimant was physically injured. Although this basic question is common to each of the cases, the underlying facts and the Deputy Com-

missioners' findings differ; accordingly, they are separately stated.

Johnson. Claimant Howard Johnson, on May 12, 1947, struck his head and neck on a cross-beam of a vessel while employed as a leaderman welder (JR. 6). Medical treatment was furnished from the date of the accident but no compensation payments were made (JR. 4, 6, 7). Although suffering extensive strain of the neck muscles, Johnson lost no time from work as a result of the accident—his employer continuing him without reduction in wages as a welder at lighter work in its machine shop until it disposed of its business on May 15, 1948 (JR. 6, 28-29). Subsequently on June 15, 1948, Johnson was discharged by the new owner because of his physical inability to do welding aboard ship (JR. 29, 31). Since that time, Johnson has been employed only intermittently at jobs requiring only the less strenuous types of welding operations (JR. 6, 29, 30). On January 17, 1949, twenty-one months after the date of the accident, Johnson filed his claim for compensation. At the time of the hearing, Johnson had just obtained new employment as a shop welder at a slightly lower rate of pay (JR. 30). The Deputy Commissioner found that no cause of action accrued in Johnson's favor under the Act until the completion of one week's disability from labor after June 15, 1948,[2]

[2] Section 6 of the Act provides that no compensation shall be allowed for the first seven days of the disability. 33 U.S.C. 906.

and that the claim for compensation was, therefore, not barred by limitations (JR. 6).

Curnutt. Claimant Frank S. Curnutt, on February 18, 1947, while employed as a sheetmetal worker aboard a vessel, wrenched his back in lifting a heavy object from the deck to a table (CR. 6, 33). Medical treatment was furnished him, but no compensation payments were made (CR. 4, 6, 7). He was disabled from work for six days (CR. 6). When he returned to his job, he was relieved of all heavy work on doctor's orders (CR. 34), and performed lighter duties at his former wage rate until his employment was terminated on January 18, 1948 (CR. 6, 34, 44). After resting for two weeks to improve his condition, he obtained work with another company (CR. 35, 50). In June, 1948, he took a vacation for five weeks as a therapeutic measure suggested by his physicians (CR. 7, 35, 51). In July, 1948, he returned to work with still another company, but soon was forced to give up this job, and subsequent ones, because the work was too strenuous (CR. 35, 36, 45). On January 17, 1949, twenty-three months after the date of the accident, Curnutt filed his claim for compensation (CR. 6). At the time of the hearing, Curnutt had just obtained new employment as a sheetmetal worker (CR. 46). The Deputy Commissioner found that Curnutt had not lost wages in excess of seven days as a result of his physical injury until February 5, 1948, and that the claim for compensa-

tion was, therefore, not barred by Limitations (CR. 6).

Shallat. Claimant Louis Shallat, on November 21, 1947, caught his left hand between a sling and a bight while working as a stevedore aboard a vessel (SR. 6). He sustained a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger (SR. 6). Shallat apparently lost no time because of the accident and continued to work. No compensation payments were made (SR. 4, 6). According to his testimony, his hand pained him considerably and he applied self-treatment (SR. 29). The pain progressively became more severe, and he filed a claim for compensation on May 23, 1949, eighteen months after the accident (SR. 6, 28). Upon these facts, the Deputy Commissioner found that Shallat had not sustained a disability for which an award could be made "until the condition of his left second finger reached a permanent stage and became a permanent disability" (SR. 6), which was "within one year prior to the filing of the claim" (SR. 6). He held, therefore, that the claim was not barred by limitations (SR. 6).

Manos. Claimant Chris Manos, on December 22, 1947, while employed as a welder aboard a vessel, was struck on the top of his head by an iron saddle falling from above and sustained a strain of the musculature in the cervical region (MR. 6, 26). He was instructed not to weld by his physician,

and, consequently, was given lighter work by his employer at the same rate of pay (MR. 6, 27-28). Medical treatment was furnished him, but no compensation payments were made (MR. 4, 7). A few months later, his job was terminated as a result of a general reduction in employment at the shipyard (MR. 28). After a week, he obtained another job as a shop welder at a slightly higher wage rate (MR. 29). This job ended in January 1949, because of a general lay off (MR. 29, 30). His neck troubled him continually since the accident, and his injury progressively became worse despite medical treatment (MR. 27, 30, 31, 35, 36, 37). On August 17, 1949, twenty months after the date of the accident, he filed his claim for compensation (MR. 7). At the time of the hearing, Manos was still unemployed, but was planning to engage in sales work (MR. 30). Upon these facts, the Deputy Commissioner found that he was forced to discontinue working as a welder and seek lighter employment because of the condition of his neck on or about January 31, 1949; that he first became disabled and suffered wage loss beginning with February 1, 1949, within one year prior to the filing of the claim; and that the claim was not, therefore, barred by limitations (MR. 7).

In the proceedings before the district court, the Deputy Commissioners justified their awards as supported by the evidence and in accordance with the law, and moved to dismiss the complaints on the ground that Section 13(a) of the Act starts the

one-year period of limitation running, not from the date of accidental physical injury, but from the date on which a legal injury becomes compensable (JR. 12, 18; CR. 12, 18; SR. 11, 17; MR. 12, 18). Without deciding this question, the district court held that the Deputy Commissioners had erred in finding that the injuries were not compensable prior to actual loss of wages. The court pointed out that compensation is payable under the Act for disability, which is defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" (33 U.S.C. 902(10)), and found, after making its own independent reappraisal of the evidence, that the claimants' earning capacity had been impaired from the dates of their physical injuries so as to have entitled them at that time to compensation in addition to full wages. It held that the claims for compensation, not having been made within one year of the physical injuries, had not been timely filed and accordingly set aside and vacated the awards (JR. 15-21; CR. 15-21; SR. 14-20; MR. 15-21).

On appeal, the court below affirmed, but rested its decision upon a different ground. On the basis of its prior decision in *Kobilkin* v. *Pillsbury*, 103 F. 2d 667, affirmed by an equally divided Court, 309 U.S. 619, 695, it held that the period of limitation begins to run from the date of the accident, and not from the date of disability or accrual of a

compensable injury (JR. 44-48; CR. 70-74; SR. 42-46; MR. 56-60).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the limitation provision of Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act requires the filing of a claim for compensation within one year after the accident rather than within one year after a compensable injury accrues.

2. In holding that the instant claims for compensation were barred by the limitation provision of Section 13(a).

3. In affirming the decrees of the district court which set aside and vacated the awards of compensation made by the Deputy Commissioners.

SUMMARY OF ARGUMENT

I

A. Respondent's case is primarily founded on the proposition that, by reason of its statutory definition in Section 2(2), the word "injury" has a clear and unambiguous meaning throughout the Longshoremen's and Harbor Workers' Compensation Act—*i.e.*, "accident" or "physical injury" —which must be applied mechanically to Section 13(a). But if we carry over that definition (in the way respondent reads it) mechanically into Section 13(a), we create obvious incongruities in the language, and vitiate the Act's humanitarian purposes. We submit, rather, that the meaning of

"injury" in Section 13(a) should be determined in light of the language and structure of the Act as a whole, the Act's humanitarian purposes, its accepted standard of liberal construction, and its legislative history. Cf. *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198.

B. In holding that the period of limitation in Section 13(a) runs from the time of the accident or physical injury instead of from the time a compensable, or legal, injury accrues, the Court of Appeals has held, in effect, that it begins to run before the cause of action accrues. Construed as a whole, the language and structure of the Act compel rejection of this interpretation. An employee has no right to compensation under the Act if he is merely the victim of an accident; nor has he any right to compensation if he sustains physical injury and pain and suffering. Under Section 3(a), compensation is payable only "in respect of disability or death"—disability being defined in Section 2(10) as "incapacity * * * to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Since an employee has no claim for compensation for "disability" until he has been disabled, it follows that the period of limitation upon that claim should not start until his injury has become compensable and he is disabled. So construed, the term "injury" is given a meaning which is consistent with its textual definition in Section 2(2) and which harmonizes the several

limitation provisions of Section 13(a). On the other hand, to read "injury" as meaning "accident" would, in the case of a disability delayed for more than a year after the accident or physical injury, compel the employee to seek compensation before he could properly claim it and bar his claim when he becomes entitled to it.

C. The construction adopted by the court below not only lacks support in the language of the Act but is also opposed to well-established principles of construction of statutes of limitations. For it has long been settled that a statute of limitations will not be allowed to run against a right until that right has accrued in a shape to be effectually enforced. Unlike tort actions based on negligence, pecuniary loss to the employee, rather than a wrongful act on the part of the employer, is the essential element in the employee's claim under workmen's compensation statutes. Since no cause of action accrues prior to such pecuniary loss, the period of limitation should begin to run not at the time of physical injury but only after economic, or compensable, injury has been sustained.

D. Although examination of the legislative history of the Act reveals no discussion of the problems involved in this case, a related phase of that history supports the view that "injury" should not be construed to mean "accident" or "physical injury." As originally introduced, the bill which later became the Longshoremen's Act provided for a period of limitation running from the time of

"accident"; as enacted, the word "injury" was substituted for "accident." Despite the absence of Congressional comment upon the reasons for the change, it seems reasonably clear that the change would not have been made unless Congress intended that "injury" should have a meaning different from that of "accident."

E. Cases in the state courts construing state compensation acts are, of course, not controlling in interpreting the Longshoremen's Act since the limitation provisions of the various state acts differ extensively. But where state statutes employ language substantially similar to that of the Longshoremen's Act, the clear weight of authority is that "injury" means "compensable injury."

II

Having shown that "injury" in Section 13(a) should be read as "compensable injury," there remains the further question of when the injuries herein became compensable. Under the Act, a physical injury other than a schedule loss becomes compensable when the employee suffers a loss of wage-earning capacity. Where the accident results in a physical injury which is a schedule loss (*i.e.*, the loss of, or the loss of the use of, a leg, arm, hand, eye, etc.), the injury becomes compensable as soon as the schedule loss is sustained. In three of the cases at bar (Johnson, Curnutt, and Manos), no schedule losses were incurred. Their injuries, therefore, became compensable when

their wage-earning capacity was impaired. In the fourth case (Shallat), a schedule loss was involved. His injury, therefore, became compensable when he sustained the schedule loss.

In each of the cases, the claimants were physically injured on the dates of their accidents, more than one year prior to the filing of their claims. However, their claims were filed, according to the findings of the Deputy Commissioners, within one year after they had suffered loss of wage-earning capacity or a schedule loss, and were, therefore, timely. We submit that examination of the record fully substantiates these findings.

ARGUMENT

Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act[3] grants to covered employees the right to workmen's compensation for "disability or death" resulting from "injury." "Disability" is defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." And "injury" is defined in Section 2(2), in pertinent part, as "accidental injury or death arising out of and in the course of employment." "The right to compensation for disability," however, is barred "unless a claim therefor is filed within one year after the injury." (Section 13(a)).

In these four consolidated cases, claims for com-

[3] Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*

pensation for "disability" were filed more than a year after the claimants sustained accidental physical injury. But each of the claims was filed, according to the findings of the Deputy Commissioners, within a year after the claimant had become disabled as a result of his physical injury in the sense that a compensable injury accrued. Thus, the question for decision is whether the statutory period of limitation begins to run upon a claim for compensation for "disability" when a claimant sustains accidental physical injury, or only when his physical injury thereafter becomes a legal injury which is compensable because it results in "disability," *i.e.*, "incapacity * * * to earn the wages which the employee was receiving at the time of injury in the same or any other employment." If the former, since more than one year had elapsed between the dates of accidental physical injury and the filing of the claims, the claims herein are barred by limitations. If, on the other hand, the period of limitation begins to run, not from the time of the accident but only after a legal injury or claim for compensation for "disability" accrues, the claims were timely filed.

On the basis of its prior decision in *Kobilkin* v. *Pillsbury*, 103 F. 2d 667, affirmed by an equally divided court, 309 U.S. 619, 695, the court below has held that the period of limitation prescribed by Section 13(a) of the Act begins at the time of the accident or trauma. The contrary view, that the

period of limitation runs only after the physical injury has resulted in a legal or compensable injury, has been taken by the Courts of Appeals for the Third and District of Columbia Circuits. *Di Giorgio Fruit Corp.* v. *Norton*, 93 F. 2d 119 (C.A. 3), certiorari denied, 302 U.S. 767; *Potomac Electric Power Co.* v. *Cardillo*, 107 F. 2d 962 (C.A.D.C.); *Great American Indemnity Co.* v. *Britton*, 179 F. 2d 60 (C.A.D.C.). We submit that the question was correctly decided by the Courts of Appeals for the Third and District of Columbia Circuits.

I

The Term "Injury" in Section 13(a) of the Longshoremen's Act Means "Compensable Injury" and Not "Accident"

A. *The Meaning of "Injury" in Section 13(a) Should Be Determined in the Light of the Language and Structure of the Act as a Whole, the Act's Humanitarian Purposes, Its Accepted Standard of Liberal Construction, and Its Legislative History.*

Respondents' case is primarily founded on the proposition that, under their reading of the statutory definition in Section 2(2),[4] the word "injury"

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[4] Section 2 provides:

When used in this Act—

* * * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably

has a "clear and unambiguous" meaning throughout the Act which must be applied mechanically to Section 13(a), and which makes unnecessary any resort to traditional aids to construction (Br. in Opp. 9). Respondents further assert that the practical purpose of statutes of limitations—to bar stale claims—requires a narrow reading of "injury." (Br. in Opp. 19-21). It is urged that "if the Longshoremen's Act is inadequate * * * it is surely not for the courts to attempt to correct such omissions." (Br. in Opp. 11).

But, in view of the conflict of opinion among the several courts of appeals, it would hardly appear that the term "injury" in Section 13(a) is clear and unambiguous. And this Court has previously noted, in construing the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. 51-56, that the term "injury" cannot be read divorced from its setting in an act of broad humanitarian purposes. Thus, holding that silicosis is an "injury" within the meaning of the Federal Employers' Liability Act, the Court stated in *Urie* v. *Thompson*, 337 U.S. 163, 180-181:

> Considerations arising from the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the

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results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

legislative history indicating a congressional intent to require a restricted interpretation or expressly to exclude such occupational disease, and the trend of existing authorities dealing with the question, combine to support this conclusion.[5]

Moreover, the Court has, with respect to the Longshoremen's Act itself, already rejected respondents' basic contention that the statutory definitions in Section 2 must always be applied literally and automatically throughout every other section. *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198, 201. In the *Lawson* case, the question for decision was whether the definition of "disability" in Section 2(10) was to be read into Section 8(f)(1). If the definition was applicable, the employer was liable for compensation for permanent total disability where an employee received an injury which of itself would only cause permanent partial disability but which, combined with a previous non-industrial disability, in fact caused permanent total disability. If, on the other hand, the term "disability" was not employed in Section 8(f)(1) as a term of art, the employer was liable only for compensation for permanent partial disability, and the statutory "second injury fund" was liable for the balance of payments necessary to equal compensation for total disability. Holding that

[5] By way of caution, we note at this point that we do not concede that the literal terms of Section 2(2) are opposed to our position. See *infra*, pp. 24-27.

"disability" was not used as a term of art in Section 8(f)(1), the Court observed (*id.* at 201):

> * * * Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case. If we read the definition into § 8(f)(1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision; the prevention of employer discrimination against handicapped workers. We have concluded that Congress would not have intended such a result.

The Court has also pointed out that a statute of limitations cannot be construed with regard only to those practical ends generally served by statutes of limitations but must take account of the broad purpose of the legislation. *Reading Co.* v. *Koons*, 271 U.S. 58. There, the question was whether, in a death action brought under the Federal Employers' Liability Act, the cause of action arose at the time of injury or only upon the appointment of an administrator who could bring suit. Section 6 of the Act provided "that no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued." The Court observed that (*id.* at 61-62):

> We do not think it is possible to assign to the word "accrued" any definite technical

> meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other; but *the uncertainty is removed when the word is interpreted in the the light of the general purposes of the statute and of its other provisions,* and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought. [Emphasis added.]

Adopting this line of inquiry, the Court concluded in the *Koons* case that the plaintiff's cause of action had accrued when the injury occurred more than two years prior to the institution of suit and that suit was therefore barred.

But this same line of inquiry led to the upholding, as timely, of another action brought under the Federal Employers' Liability Act, in *Urie* v. *Thompson,* 337 U.S. 163, a case where, like the present, the legal injury giving rise to the claim was long subsequent to the circumstances which eventually produced it. In *Urie,* the issue was whether, in an action to recover damages for silicosis arising from the conditions of plaintiff's employment, the cause of action arose when plaintiff was first exposed to physical injury by silica dust or only later when he suffered legal injury by becoming incapacitated for work. Alternatively, defendant argued that each inhalation of silica dust was a separate tort giving rise to a fresh cause of action, and that plaintiff was, therefore, limited to

a claim for inhalations within the period of limitation. Both of the defendant's constructions of the statute of limitations were rejected. The Court pointed out that, if it be assumed that Congress intended to include occupational diseases in the category of injuries compensable under the Act, "such mechanical analysis of the 'accrual' of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose." *Id.* at 169. Continuing, the Court stated (*id.* at 169-170):

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy.
>
> * * * * *
>
> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie

should have known he had silicosis at any earlier date. * * *

It is apparent from the *Koons* and *Urie* cases that varying considerations may require the same provision for a period of limitation to be construed and applied in different ways. It is also apparent that words such as "injury" may have different meanings, depending upon the purpose and the context of the particular provision. Accordingly, the proper inquiry is to examine the general considerations affecting the present issue and to determine whether they support the rule announced below.

B. Read as "Compensable Injury," the Term "Injury" in Section 13(a) Is Consistent with Its Textual Context and Avoids Barring Compensation Claims for Disability Before They Arise.

Read as a whole, the language and structure of the Act compel the construction that "injury" in Section 13(a) refers to a legal or compensable injury and require rejection of the interpretation given by the court below. In holding that the period of limitation runs from the time of accident or physical injury instead of from the time a compensable injury accrues, the court below has held, in effect, that it begins to run before the cause of action accrues.

1. The Act does not recognize the mere fact that an employee is the victim of an accident as a legal

injury giving him a right to compensation; nor is mere pain and suffering a legal or compensable injury. The Act does not give an employee any right to compensation (other than the medical services and supplies provided for in Section 7) even if he sustains an accidental physical injury to his person. Under Section 3(a), compensation is payable only "in respect of disability or death"—disability being defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Compensation for disability, furthermore, is payable only if the incapacity to earn wages, *i.e.*, the "disability"—which may be temporary or permanent (Section 8)—lasts more than seven days. Section 6 provides that "no compensation shall be allowed for the first seven days of the disability," and Section 19(a) does not permit the filing of a claim for compensation until "any time after the first seven days of disability following any injury."[6]

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[6] Respondents apparently contend that Section 19(a) does permit the filing of a claim for compensation before the expiration of the first seven days of disability since employees are entitled to immediate medical benefits under Section 7 of the Act. (Br. in Opp. 18). However, such rights to medical benefits do not make an "accident" necessitating treatment a "compensable injury." Medical benefits are not "compensation" under the Act, *Marshall* v. *Pletz*, 317 U.S. 383, and the limitation provisions of Section 13(a) and Section 19(a) relate only to claims for "compensation" for "disability" or "death." In this connection, it should be noted that, contrary to respondents' assertions (Br. in Opp. 16-18, 26-27),

The statutory scheme, accordingly, is as follows: The employee (or his representative) can recover compensation only if the employee is killed, or rendered temporarily or permanently incapable of earning his customary wages; the death or disability must be the result of an accidental physical injury. The occurrence of an accident (a term not used in the statute) gives no right to compensation, nor does the sustaining of a physical injury; disability or death must result before a claim for compensation can accrue to the employee or his representative.

Since an employee cannot file a claim until he has been disabled (*i.e.* suffered loss of earning capacity), temporarily or permanently, for more than seven days, it would seem to follow as a matter of course that the period of limitation prescribed in Section 13(a) cannot start until the employee is thus disabled so that a claim for compensation has accrued. In other words, in Section 13(a), "injury" should be construed, as was done in the *Di Giorgio* and *Potomac Electric Power Co.* cases, *supra*, p. 15, to mean not the accidental physical injury but a legal injury or "compensable injury." The contrary reading, adopted by the court below,

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we do not take the position that Section 19(a) prohibits one who has been permanently disabled as a result of an injury, without first having been temporarily disabled, from filing a claim because he never sustained seven days of temporary disability. We contend only that, whether the disability be temporary or permanent, Section 19(a) prevents the accrual of a cause of action and the filing of a claim for compensation before seven days of disability have elapsed.

would cause the period of limitation to run before the cause of action accrues and the employee becomes entitled to file a claim at all. Construing the word "injury" to mean "accident" would, in the case of a disability the accrual of which is delayed for more than a year after the accident, compel the employee to seek compensation before he could claim it, and bar his claim when he first becomes entitled to it.[7] Cf. *Woods* v. *Stone*, 333 U.S. 472, 477. The incongruity of such a situation defeats any attempt to ascribe this intention to Congress. Cf. *Lawson* v. *Suwannee S. S. Co.*, 336 U.S. 198, 201.

2. Examination of the statutory definition of "injury" further substantiates the conclusion that that term was not employed in Section 13(a) as a synonym for "accident." Section 2(2) defines "injury" as (i) "accidental injury," or (ii) "death," either of which arises "out of and in the course of employment," and (iii) "occupational disease or infection as arises naturally out of such employment," or (iv) "as naturally or unavoidably results from such accidental injury," and (v) "includes an injury caused by the willful act of a third person." Footnote 4, *supra*, p. 15; *infra*, p. 56. Since "accidental injury" can mean only one thing

[7] Compare *Esposito* v. *Marlin-Rockwell Corp.*, 96 Conn. 414, 114 Atl. 92, in which the court pointed out (96 Conn. at 418) that the Connecticut Compensation Law makes no provision for a claim for disability which an employee believes may arise in the future as a result of an accident. The same is true of the Longshoremen's Act. See also *Poster* v. *Hilt Co.*, 30 D & C (Pa.) 657.

—physical injury resulting from an accident—and since "accident" cannot be defined in normal usage to mean "occupational disease or infection as arises naturally out of such employment" or "injury caused by the willful act of a third person," it is apparent that "injury" is not always equivalent to "accident" under the Act. Moreover, the term "accidental injury" indicates by itself that "accident" and "injury" are different and not the same.

That "injury" does not mean "accident" is also demonstrated by the wording of Section 13(a), which provides that a claim for compensation must be filed "within one year after the injury" and "within one year after the death." To read "injury" in Section 13(a) as meaning "accident" is to ignore the fact that "injury" includes "death" and that the period of limitation upon a claim for death expressly does not begin at the time of the accident, but only when the accident has culminated in death so as to constitute a legal or compensable injury. Cf. *International Mercantile Marine Co.* v. *Lowe,* 93 F. 2d 663, 665 (C.A. 2), certiorari denied, 304 U.S. 565; *Hitt* v. *Cardillo,* 131 F. 2d 233 (C.A.D.C.), certiorari denied, 318 U.S. 770. Obviously, death is not always or even generally concurrent with the accident; it frequently occurs at some later time. Further, as noted above, "injury" includes, within its statutory definition, occupational disease or infection resulting from

accidental injury. Implicitly, therefore, in cases where occupational disease or infection results from accidental physical injury, "injury" could not be defined as "accident" without barring claims for occupational disease which develops more than a year after the accident—a result plainly not contemplated by Congress. Cf. *Urie* v. *Thompson*, 337 U.S. 163.

It would seem to follow that, where an accident results in "accidental injury," the "injury" (within Section 13(a)) does not occur at the time of the accident, but, as in the case of death or occupational disease, only when there is a legal injury—when the resulting disability arises and the injury becomes compensable. We submit, therefore, that the Act intended to distinguish between "accident" and "injury" and not to equate them. To read "injury" as "accident" where trauma are concerned, would be to accord an inconsistent treatment under Section 13(a) to the three statutory kinds of "injury"—trauma, death, and occupational disease.

On the other hand, to read "injury" as "compensable injury" is to define that term in a manner which, as we have just shown, is consistent with its textual definition in Section 2(2), which harmonizes the several limitation provisions of Section 13(a), and which avoids the incongruity of an interpretation which would bar compensation claims before they arise. Thus read, the word "injury"

is given a meaning entirely in accord with the Act's humanitarian purposes and its established standard of liberal construction in order to accomplish those purposes.[8] See *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U.S. 408, 414; *Harbor Marine Contracting Co.* v. *Lowe*, 152 F. 2d 845, 847 (C.A. 2); certiorari denied, 328 U.S. 837; *Travelers Insurance Co.* v. *Branham*, 136 F. 2d 873, 875 (C.A. 4).[9]

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[8] The intention of Congress that the statute be liberally construed in favor of the employee is manifest in the Act itself. Section 20 provides that: "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of this Act. (b) That sufficient notice of such claim has been given. (c) That the injury was not occasioned solely by the intoxication of the injured employee. (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

[9] It should be observed that the word "injury" might be construed as "accident" in other sections of the Act. See Section 3(a) ("injury" must occur upon navigable waters of the United States), and cf. *Bethlehem Steel Co.* v. *Parker*, 163 F. 2d 334 (C.A. 4) (notification of injury). In still other provisions, it could not possibly mean "accident." See Section 7 ("such medical * * * attendance * * * as the nature of the injury * * * may require"), Section 30 (requiring reports concerning the "nature of the injury"), and the title of Section 33 ("Compensation for injuries where third persons are liable"). But there is no need to decide such issues in the instant cases; as shown in Point I, A (*supra*, pp. 15-21), the word "injury," wherever it occurs, should be construed in the light of the context, structure, and purposes of the Act, and its meaning in different places need not be the same if the context, structure, and purposes indicate otherwise. Cf. *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198; *United States* v. *Champlin Refining Co.*, 341 U.S. 290.

That "injury" may properly be construed in various ways in different places of the Act is sharply illustrated by the construction the Supreme Court of Maine has given that term in its workmen's compensation law. Thus, it has in-

C. *The Interpretation of "Injury" as "Compensable Injury" Accords with the Traditional Purposes of Statutes of Limitation.*

The construction adopted by the court below not only lacks support in the language of the statute but is also opposed to well-established principles of construction of statutes of limitations. For it has long been settled, in this Court and other courts, that "it cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman*, 119 U.S. 587, 602; see also *Clark* v. *Iowa City*, 20 Wall. 583, 587; *Amy* v. *Dubuque*, 98 U.S. 470, 475; *Louisville & St. Louis Railroad* v. *Clarke*, 152 U.S. 230; *Dusek* v. *Pennsylvania R. Co.*, 68 F. 2d 131 (C.A. 7); *Cary* v. *Koerner*, 200 N.Y. 253, 259; *Cooke* v. *Gill*, L.R. 8 C.P. 107 (1873); *Read* v. *Brown*, L.R. 22 Q.B.D. 128 (1888); 19 Halsbury, *The Laws of England* (1911), p. 42; Wood, *Limitations* (4th Ed. 1916), § 122a.[10]

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terpreted "injury" in that section of the state law which requires the employee to furnish medical services for two weeks "after the injury," and in the section requiring notice unless the employee knew of the "injury," to mean "accident;" but in the provision which requires claims to be filed within a year after the "injury," the word means "compensable injury" rather than "accident." *McKenna's Case*, 117 Me. 179, 103 Atl. 69; *Hustus' Case*, 123 Me. 428, 123 Atl. 514; *Bartlett's Case*, 125 Me. 374, 134 Atl. 163; *Fogg* v. *Woodcock Lunch*, 125 Me. 524, 134 Alt. 626.

[10] See also *Paulson* v. *United States*, 78 F. 2d 97, 99 (C.A. 10); *Federal Reserve Bank* v. *Atlanta Trust Co.*, 91 F. 2d 283 (C.A. 5), certiorari denied, 302 U.S. 738; *Bass* v. *Standard Accident Insurance Co.*, 70 F. 2d 86, 87 (C.A. 4);

In tort actions based on negligence, it has usually been held that the statute of limitations starts running from the time of commission of the tort. The tort itself gives rise to a cause of action, at least for nominal damages, and the fact that substantial or increased damages resulting from the tort are not sustained until later is irrelevant. Cf. *Wilcox* v. *Plummer*, 4 Pet. 172; *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 117, 1200 ff; American Law Institute, *Restatement, Torts* (1939 ed.) § 899, comment c; Wood, *op. cit. supra*, § 179. But claims arising under workmen's compensation statutes do not sound in tort. They are not based upon any wrong to the employee by the employer but are a statutory incident of the employer-employee relationship, which imposes liability without fault rather than substituting a statutory tort for a common-law tort. *Bradford Electric Co.* v. *Clapper*, 286 U.S. 145, 157-158; *Crowell* v. *Benson*, 285 U.S. 22, 38, 41-42. Thus, Section 4(b) of the Longshoremen's Act expressly states that compensation is payable "irrespective of fault as a cause for the injury."

Because liability is imposed without fault under compensation statutes, pecuniary loss to the em-

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Stevens v. *McChrystal*, 150 Fed. 85, 88 (C.A. 8); *Taylor* v. *Salt Creek Consol. Oil Co.*, 285 Fed. 532, 541 (C.A. 8); *Ewell* v. *Chicago & N.W. Ry. Co.*, 29 Fed. 57 (C.C.S.D Iowa); *Crapo* v. *City of Syracuse*, 183 N.Y. 395, 402; *Dept. of Banking* v. *McMullen*, 134 Neb. 338, 345; *Farneman* v. *Farneman*, 46 Ind. App. 453, 457.

ployee, rather than a wrongful act on the part of the employer, is the legal injury which constitutes the essential element of the employee's claim. It is the "pecuniary risk" which is shifted by statute to the employer. *Arizona Employers' Liability Cases*, 250 U.S. 400, 420. For this reason, an employee who is physically injured as a result of the employer's negligence but who does not sustain legal injury by loss of earning capacity is not given a remedy. His legal rights under such statutes are invaded only in the event of disability or death. Since the employee has no claim, and is in no position to enforce any claim until he has been disabled from earning, it follows that the period of limitation does not run before such disability results.[11] "It would be unusual, to say the least, if a statutory scheme were to be construed to include a period during which an action could not be com-

[11] It is pertinent to observe that this same result obtains in some tort situations as well. Thus, where the damages themselves are an essential element in the cause of action, the statute of limitations runs from the time of damage rather than from the factual setting-into-motion of the forces which caused the damage. Cf. *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503 (1861); *Roberts* v. *Read*, 16 East (K.B.) 215 (1812); *Attleboro Mfg. Co.* v. *Frankfort, etc., Ins. Co.*, 240 Fed. 573 (C.A. 1); *Cass* v. *Pennsylvania Co.*, 159 Pa. 273, 28 Atl. 161; *Church of Holy Communion* v. *Paterson Extension R. Co.*, 66 N.J.L. 218, 49 Atl. 1030; *Pollock* v. *Pittsburgh, B. & L.E.R. Co.*, 275 Pa. 467, 119 Atl. 547; *Sullivan* v. *Old Colony St. Ry. Co.*, 200 Mass. 303, 86 N.E. 511; *Miller* v. *Eskridge*, 23 N.C. 147; *Ludlow* v. *Hudson River R. Co.*, 6 Lans. (N.Y.) 128; *Gillon* v. *Boddington*, 1 C. & P. 541 (1824); *Whitehouse* v. *Fellowes*, 10 C.B. (N.S.) 765 (1861); see *Wilcox* v. *Plummer*, *supra*, at p. 181; *Northrop* v. *Hill*, 57 N. Y. 351, 358; Halsbury, *op. cit. supra*, vol. 20, p. 153; Wood, *op. cit. supra*, § 178.

menced as a part of the time within which it would become barred." *Woods* v. *Stone, supra* at 477. A contrary conclusion, we submit, cannot be reconciled "with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal right." *Urie* v. *Thompson, supra,* at 170.

This distinction between the application of statutes of limitations to tort cases on the one hand, and to workmen's compensation cases on the other hand, is well expressed in *Salt Lake City* v. *Industrial Comm.*, 93 Utah 510, 74 P. 2d 657, which was a workmen's compensation case governed by a one-year statute of limitations. The court overruled a long line of its own prior decisions which had held the period of limitation to begin at the time of accident, stating (93 Utah at 513):

> Holding that the statute begins to run from the time of accident instead of from the time of compensable disability or loss, in effect makes the statute begin to run before the cause of action accrues. In negligence cases the cause of action arises from the negligence which causes the accident and therefore the statute begins to run from the time the negligence operated on plaintiff, which would be at the time of the accident. But no such rule applies in compensation cases. Compensation does not depend upon negligence. * * * Not until there is an accident and injury and a disability or loss from the injury does the duty

> to pay arise. A mere accident does not impose the duty to pay. Accident plus injury therefrom does not impose the duty. But accident plus injury which results in disability or loss gives rise to the duty to pay. * * * [12]

See also *Schmidt* v. *Merchants Despatch Transp. Co.*, 270 N.Y. 287, 302, 200 N.E. 824; *Plazak* v. *Allegheny Steel Co.*, 324 Pa. 422, 188 Atl. 130. We submit, therefore, that in the absence of a clear and unambiguous manifestation of Congressional intent that the period of limitation is to begin before the employee is entitled to recover compensation, no such conclusion should be drawn by the courts.

D. *The Legislative History of the Longshoremen's Act Supports the View That "Injury" Means "Compensable Injury" in Section 13(a).*

Disputing the correctness of the above analysis, respondents urge that, if Congress had intended the period of limitation to begin when an employee is

[12] For this reason, among others, we believe the position taken here is supported by this Court's decision in *McMahon* v. *United States*, No. 17, this Term, decided November 5, 1951, and is wholly consistent with our position therein. That case arose under a statute basing liability upon tort, not upon loss of earning capacity, and therefore having a different structure and presenting different considerations. Under that statute, a claimant's cause of action accrues and his substantive rights become fixed at the time of physical injury. In the instant cases, on the other hand, the employee has no claim for "accident" or "injury," nor does he have a claim for compensation at the moment of accidental physical injury; the claim is for "disability" and that claim arises only when "disability" results from loss of capacity to earn his customary wages.

disabled from earning and thus entitled to compensation, Congress would have employed the term "disability" rather than "injury" in Section 13(a) of the Act (Br. in Opp. 23-25).[13] It can as soundly be argued that, if Congress had intended the period to begin at the time of the "accident," it would have employed that word rather than substituting for it the different word "injury" (see *infra*, pp. 34-40). We think it not without significance that Congress deliberately employed the word "injury."

Examination of the legislative history of the Longshoremen's Act reveals no discussion, either in the debates or in the reports of the Congressional committees, of the problems directly involved in this case.[14] But a related phase of the

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[13] In this connection, it should be pointed out that we do not contend that "injury" in Section 13(a) is synonymous with "disability." We contend only that compensation for disability resulting from physical injury is not barred unless the claim is filed more than a year after the employee first becomes entitled to file a claim for disability resulting from such physical injury. Just as a single "accident" may cause several "injuries" (*e. g.*, a sprained ankle, a broken arm, and a concussion), so a single "injury" may cause several "disabilities" (*e. g.*, an occupational disease may disappear and then recur, or a fracture or wound may heal but subsequently lead to complications, so that repeated periods of "disability" are suffered from a single "injury"). Since Congress used the word "injury" rather than "disability," it may be that the period of limitation runs with respect to all disabilities arising out of a single injury after the injury has become compensable. But that question is not involved in the instant cases, just as it was not involved in *Kobilkin* v. *Pillsbury*, 309 U.S. 619. Contrary to respondents' assertions (Br. in Opp. 9-11), we do not argue that these are cases of "new and further disability."

[14] See 67 Cong. Rec. 4119, 10608, 10614; 68 Cong. Rec. 5402, 5414, 5900-5909; S. Rept. 973, 69th Cong., 1st Sess.; H.

legislative history lends support to the view that "injury" should not be construed to mean "accident."

When the bill which became the Longshoremen's Act (S. 3170, 69th Cong., 1st Sess.; 67 Cong. Rec. 4119) was originally introduced in the Senate, Section 14 of the bill, containing provisions which were eventually embodied in Section 13 of the Act, provided that:

> The right to claim compensation shall be barred unless within two years after the accident * * * a claim for compensation shall be filed with the deputy commissioner * * *

A comparison of this provision of the bill with the language ultimately enacted into law shows that Congress reduced the statutory period from two years to one year, and also substituted the word "injury" for the word "accident."[15] Despite the absence of Congressional comment upon the reasons

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Rept. No. 1767, 69th Cong., 2d Sess.; Hearings, Senate Subcommittee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., March 16 and April 2, 1926; Hearings, House Committee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., June 26, 1926; cf. H. Rept. No. 1190, 69th Cong., 1st Sess., on H. R. 12063.

[15] The bill, S. 3170, used the word "injury" at various points, and the word "accident" at others. In the statute as enacted, the word "accident" is not used except in its adjectival form describing an "accidental injury." Thus, "accident" in Section 10(a) of the bill became "injury" in Section 9(f) of the Act; "accident" in Section 12(a) of the bill became "injury" in Section 12(a) of the Act; "accident" in Section 12(e) of the bill became "injury" in Section 12(d) of the Act; and "accident" in Sections 27, 63, and 64 of the bill became "injury" in Sections 23(a), 41(a), and 41(b) of the Act, respectively.

for the change, it seems reasonably clear that the change would not have been made unless Congress intended that "injury" should have a meaning different from that of "accident." And that meaning must be, we submit, the meaning urged in this brief—*i.e.*, that "injury" means "compensable injury."[16]

It may be urged that, despite the foregoing, "injury" should be construed to mean "accident" because of a decision, prior to the enactment of the Longshoremen's Act, of a New York court under the New York Workmen's Compensation Law, upon which the Longshoremen's Act is modeled. (H. Rept. No. 1190, 69th Cong., 1st Sess.; *Law-*

[16] Respondents apparently urge that Congress' rejection of "accident" in favor of "injury" was due merely to the circumstance that "accident" would not have been appropriate in occupational disease cases (Br. in Opp. 8). But there is no reason why Congress could not, had it so desired, have specified, as does the New York Law (*infra*, p. 36, note 18), that the period of limitation should run from the "accident" in accidental injury cases, and from the time of infection or disability in disease cases. (Cf. also, the Amendment of 1927 to the Connecticut Statute, Pub. Acts, 1927, ch. 307, Sec. 5, which requires that claims be filed within a year "from the date of the accident or from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury"). Furthermore, various state compensation laws enacted prior to the Longshoremen's Act had provided that the period of limitation should run from the "accident" (*e.g.*, New York Laws, 1918, ch. 623), and Congress by express amendment declined to adopt such provisions in the federal act. Respondents' argument works against them, in fact, because if "injury" be construed as "accident" with respect to accidental injuries, the word must have a different meaning in occupational disease cases where there is no "accident." Under our construction, "injury" has the same meaning with respect to both accidental injuries and occupational diseases.

son v. *Suwannee S.S. Co., supra,* at 205). The New York Workmen's Compensation Law, as originally enacted (L. 1913, ch. 816),[17] provided, in Section 18, that notice of an injury "for which compensation is payable" should be given within ten days after "disability." Section 28 provided that—

> The right to claim compensation * * * shall be forever barred unless within one year after the injury * * * a claim for compensation thereunder shall be filed with the commission.

These provisions, apparently without undergoing any judicial review, were amended (L. 1918, ch. 634) by the substitution of the phrase "within thirty days after the accident causing such injury" in Section 18, and by a provision changing the word "injury" in Section 28 to "accident" and adding a requirement that the bar shall be deemed waived unless the objection be raised "on the hearing" of the claim.[18]

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[17] The law was declared unconstitutional (*Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271) but was reenacted, after adoption of an amendment to the state constitution, by L. 1914, ch. 41. It is now Chapter 67 of the Consolidated Laws of New York (Book 64, McKinney's Consolidated Laws of New York).

[18] Sec. 28 was again amended by L. 1928, ch. 754, to extend to the Commission the power to permit the filing of a claim after expiration of one year after the accident, whenever it should find such filing to be "in the interest of justice." Under Sec. 38 of the New York law, "disablement" in occupational disease cases is treated as the equivalent of "accident" in accidental injury cases.

In 1919, the Appellate Division of the Supreme Court, Third Department, had occasion to consider the limitation provisions of the earlier statute (in which "injury" was used) in *O'Esau* v. *E. W. Bliss & Co.*, 188 App. Div. 385, 177 N.Y. Supp. 203. In that case, the employee suffered an accident on March 28, 1916, which caused him to lose three weeks of work. The State Commission found that the accident incapacitated him for the performance of his usual work, and that he would have been disabled from working from the date of the accident had not his employer kept him on as a foreman, at the same wages which he had theretofore received as a workman, for more than a year after the accident. The employee was discharged on April 30, 1917, and subsequently died as a result of the injury on March 21, 1918. His claim for disability compensation was filed more than a year after the accident. It was urged on behalf of the decedent's representative that the employer was estopped from interposing the defense of limitations because he had kept the employee on at his old wages, thus inducing the employee to delay in filing his claim. The court held that the limitation provision was jurisdictional, and that the employer could not be estopped from invoking it.

In so holding, the court stated, at one point, that the law required the claim to be filed within one year from "the date of the accident" (188 App. Div., at 389). Elsewhere, the court employed

the word "injury," observing that the limitation provision "is clearly a jurisdictional fact; without the filing of the claim within one year from the injury the Commission is powerless to act * * *." (188 App. Div., at 389). In view of the court's indiscriminate use of the two terms without an express declaration that they were synonymous under the statute; we do not believe the court intended to make any ruling on that point. Indeed, such a ruling was unnecessary. Whether or not "injury" meant "accident" under the statute, they were factually identical in the circumstances of the particular case. The findings of the State Commission, quoted by the court (188 App. Div., at 387), show that the employee was injured and actually disabled from doing his former work from practically the date of the accident. Cf. *McLaughlin* v. *Western Union Telegraph Co.*, 17 F. 2d 574 (C.A. 5). Undoubtedly for that reason, the distinction here advanced between "accident" and "injury" was not urged upon the court, which stated that the argument of estoppel presented the only question in the case. Since the employee presumably knew, or had reason to know, that he had been disabled from the date of the accident, it necessarily followed that the period of limitation began to run from the date of the accident and was not suspended by the action of the employer in retaining him at his former wages in the entirely different capacity of foreman. Cf. *Twin Harbor*

Stevedoring & Tug Co. v. *Marshall*, 103 F. 2d 513 (C.A. 9). We submit, therefore, that the *O'Esau* case in no way compels the construction of "injury" in the Longshoremen's Act as meaning "accident."

In any event, this decision of a single department of the Appellate Division, unreviewed by the Court of Appeals,[19] certainly does not establish a known and settled interpretation of the New York statute by the courts of New York which can be deemed to have been adopted by Congress in the passage of the Longshoremen's Act. Cf. *Carolene Products Co.* v. *United States*, 323 U.S. 18, 26. The New York law was amended in 1918, one year before the *O'Esau* decision and eight years before the passage of the Longshoremen's Act, by substituting "accident" for "injury." That amendment, it may be assumed, was made for the express purpose of ensuring that the period of limitation would begin at the date of the "accident," since under the original language (using "injury") the normal construction would have been that the period would start when the employee became entitled to compensation. Cf. *Landauer* v. *State Industrial Accident Comm.*, 175 Ore. 418, 154 P. 2d 189, and cases there collected. Yet Congress, aware

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[19] In light of the views subsequently expressed by the New York Court of Appeals in *Schmidt* v. *Merchants Despatch Transp. Co.*, 270 N. Y. 287, 302, 200 N. E. 824, 827-828, it is doubtful that that court would have construed "injury" to mean "accident."

of amendments to the New York law which it used as a model,[20] refused to adopt the language of the amended New York statute and instead, by express amendment to the bill, substituted "injury" for "accident." Cf. *Federal Mutual Liability Ins. Co.* v. *Locke*, 60 F. 2d 895 (C.A. 2). Thus, even had the *O'Esau* case been a clear and authoritative construction of the old wording, Congress' failure to adopt the New York statute's amended language would have shown an intention that the period of limitation in the federal act should not start with the accident. Otherwise, Congress' substitution of "injury" for "accident" was a futile gesture and effected no change in meaning. It seems much more probable that Congress intended to adopt the construction of "injury" as meaning "compensable injury," as had been the more usual holding under state compensation acts in which the word "injury" was used (*infra*, pp. 40-42).

E. *Where State Statutes Employ Limitation Provisions Substantially Similar to That of the Longshoremen's Act, the Clear Weight of Authority Is That "Injury" Means "Compensable Injury".*

Cases in the state courts construing state compensation acts are, of course, not controlling in

[20] The fact that the New York act had been amended was expressly adverted to in two Congressional committee reports, although no reference to any particular amendment was made. H. Rep. No. 1190, 69th Cong., 1st Sess., on H. R. 12063; H. Rep. No. 1422, 70th Cong., 1st Sess.

interpreting the Longshoremen's Act. The limitation provisions of the various state acts differ extensively, some use the word "injury" as does the Longshoremen's Act, some use "accident," some have special governing definitions, and some have entirely different provisions. But where state statutes employ language substantially similar to that of the Longshoremen's Act, the clear weight of opinion, as the Courts of Appeals for the Third and District of Columbia Circuits pointed out in the *Di Giorgio* and *Potomac Electric Power Co.* cases, *supra*, p. 15, is that "injury" means "compensable injury." See *Donaldson* v. *Calvert McBride Printing Co.*, 232 S.W. 2d 651 (Ark.); *Marsh* v. *Industrial Accident Comm'n*, 217 Cal. 338, 18 P. 2d 933; *Esposito* v. *Marlin-Rockwell Corp.*, 96 *Conn.* 414, 114 Atl. 92; *Burke* v. *Industrial Accident Comm'n*, 368 Ill. 554, 15 N.E. 2d 305; *Farmers Mutual Liability Co.* v. *Chaplin*, 114 Ind. App. 372, 51 N.E. 2d 378; *Guderian* v. *Sterling Sugar & Ry. Co.*, 151 La. 59, 91 So. 546; *Hustus' Case*, 123 Me. 428, 123 Atl. 514; *Clausen* v. *Minnesota Steel Co.*, 186 Minn. 80, 242 N.W. 397; *Wheeler* v. *Missouri Pac. R. Co.*, 328 Mo. 888, 42 S.W. 2d 579; *Anderson* v. *Contract Trucking Co.*, 48 N.M. 158, 146 P. 2d 873; *Rosa* v. *George A. Fuller Co.*, 74 R.I. 215, 60 A. 2d 150; *Acme Body Works* v. *Koepsel*, 204 Wisc. 493, 234 N.W. 756, 236 N.W. 378; *Baldwin* v. *Scullion*, 50 Wyo. 508, 62 P. 2d 531; see also Br. for Resp. Pillsbury, in *Kobilkin*

v. *Pillsbury*, No. 204, Oct. Term 1939, pp. 32-33, Appendix, C, pp. 54-62.

Insofar as state decisions rendered prior to the enactment of the Longshoremen's Act may be of significance in attributing an intention to Congress to adopt the then prevailing construction of the term "injury" in state compensation laws, it is to be noted that, the courts of Connecticut,[21] Indiana,[22] Louisiana[23] and Maine[24] had construed "injury," in the limitation provisions of acts fairly comparable to the subsequently enacted federal act, to mean "compensable injury" rather than "accident." The courts of Nebraska had adopted the same rule even though the Nebraska statute used the word "accident." *Johansen* v. *Union Stock Yards Co.*, 99 Neb. 328 (1916). See also *Frank Martin-Laskin Co.* v. *Goetsch*, 172 Wis. 548 (1920). A contrary result had been reached only in Michigan[25] and perhaps in New York[26] and Oregon.[27]

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[21] *Esposito* v. *Marlin-Rockwell Corp.*, 96 Conn. 414, 114 Atl. 92 (1921); *Hines* v. *Norwalk Lock Co.*, 100 Conn. 53 (1924).

[22] *In re McCaskey*, 65 Ind. App. 349, 117 N. E. 268 (1917); *Hornbrook-Price Co.* v. *Stewart*, 66 Ind. App. 400, 118 N. E. 315 (1918).

[23] *Guderian* v. *Sterling S. & R. Co.*, 151 La. 59, 91 So. 546 (1922).

[24] *Hustus' Case*, 123 Me. 428, 123 Atl. 514 (1924).

[25] *Cooke* v. *Holland Furnace Co.*, 200 Mich. 192, 166 N. W. 1013 (1918).

[26] In the *O'Esau* case analysed *supra*, pp. 35-39.

[27] The Oregon decision (*Lough* v. *State Industrial Accident Comm'n*, 104 Ore. 313, 207 Pac. 354) was rendered after legislative repeal of an express statutory provision which started the period of limitation at the time "the right [to compensation] accrued."

F. *Summary.*

We submit that the construction of "injury" in Section 13(a) of the Longshoremen's Act as meaning a legal or "compensable injury," and not an accidental physical injury, is supported by the language and structure of the Act, by its legislative history, and by the underlying rationale of statutes of limitations. It is supported, moreover, by every consideration relating to the general aims of the Act, the sphere in which it operates, and the basic principle of construction announced by this Court as applicable to the Longshoremen's Act. *Baltimore & Phila. Steamboat Co.* v. *Norton,* 284 U.S. 408, 414.

If the time for filing claims begins, as the court below held, from the accident rather than when the injury becomes compensable, it will be necessary for each employee who meets with an accident, whether or not he suffers a legal injury, or disability, or loss of pay, to file a claim for compensation as a matter of self-protection although he may be fully cognizant that he has suffered no legal injury and has no right to receive compensation and fully expects that his claim will be rejected. This interpretation of the Act will not be readily understood by those whom the Act seeks to protect, and would thus operate to their detriment. In particular, a disabled workman who has been paid full wages will not readily regard himself as entitled to compensation in addition to full wages, and an

unscrupulous employer may lull an employee into allowing the short limitations period to run by paying full wages for a year and then dismissing him. Cf. *Twin Harbor Stevedoring & Tug Co.* v. *Marshall,* 103 F. 2d 513, 516 (C.A. 9).

Further, the interpretation of the court below is one which would impair effective administration of the Act. Thus, in the San Francisco Compensation District (under the Longshoremen's Act) alone, some 27,000 physical injuries were reported under the Act in 1946 (the last year in which detailed figures were reported) or 74 for each calendar day, in which the disability was 7 days or less. If claims must be filed in all such cases to avoid the period of limitations, it would be necessary for the Deputy Commissioner, pursuant to the requirements of Section 19 of the Act (33 U.S.C. 919), upon receipt of each claim, to give notice thereof to the employer and compensation carrier, to investigate, to hold hearings and to adjudicate each claim. It is doubtful that the Deputy Commissioner could perform these statutory functions and do justice to the claims actually compensable under the Act. We submit that such are likely to be the results if the rule adopted by the court below prevails.

II

The Record Supports the Deputy Commissioners' Findings That the Claims Were Filed Within One Year After the Injuries Became Compensable

Having shown that "injury" in Section 13(a) should be read as "compensable injury," there remains the further question of when the injuries in these cases became compensable. In general, "disability" accrues and an injury becomes compensable when the employee is incapable (for more than seven days (Sec. 6)) "because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (Section 2(10)). This definition embodies two distinct concepts. There must be, of course, an accidental physical injury. But physical injury or pain is not, in itself, enough to warrant a finding of disability. The legal injury which is compensated is a pecuniary one. Economic injury must be present. The accident must result not only in physical damage to the employee but must also impair his wage-earning capacity before a claim for compensation accrues. If the disability is total in nature, the employee is entitled to receive, as compensation, 66⅔ percent of his prior average weekly wages during the continuance of the disability (Section 8, subdivisions (a) and (b)). In cases of temporary partial disability resulting in decrease of earning capacity, compensation is two-thirds of the difference between

the injured employee's average weekly wages before the accidental physical injury and his wage-earning capacity after such injury in the same or another employment, during the continuance of the disability for a period not exceeding five years (Section 8(e)). On the other hand, economic injury is conclusively presumed where the employee suffers a schedule loss and thus becomes permanently disabled, *i.e.*, where the employee loses, or loses the use of, a body member (Section 8, subdivisions (a) and (c)).

Thus, the statutory scheme is as follows: Where an accident results in an injury other than a schedule loss, the injury becomes compensable when and only when the employee suffers a loss of earning capacity. However, if the accident results in an injury which is a schedule loss, that injury becomes compensable as soon as the schedule loss is sustained. Accordingly, our factual inquiries as to when the injuries herein became compensable must necessarily be approached with regard to the nature of those injuries. In three of the cases at bar (Johnson, Curnutt, and Manos), no schedule losses were incurred. Their injuries, therefore, became compensable only when their earning capacity was impaired. In the fourth case (Shallat), a schedule loss was involved. His injury, therefore, became compensable as soon as he sustained the schedule loss. Because of these factual dif-

ferences in the cases, they will be treated separately in the discussion which follows.

1. *Johnson, Curnutt, and Manos.*

Johnson, Curnutt, and Manos were physically injured on the dates of their accidents, more than one year prior to the filing of their claims. Their claims were filed, however, according to the findings of the Deputy Commissioners, within one year after they had suffered legal or economic injury. Although the Deputy Commissioners did not make express findings, in so many words, as to when the claimants became incapable of earning their former wages, they did make findings with respect to the dates on which the employees suffered loss of wages. Since the Deputy Commissioners further found that the employees had not been disabled prior to the dates on which they sustained loss of wages, it must be presumed from these ultimate findings that the Deputy Commissioners were of the opinion that the employees' wage-earning capacity had not, in fact, been impaired prior to their first loss of wages.[28]

[28] The district court apparently was of the opinion that the Deputy Commissioners had ruled as a matter of law that the claimants' injuries could not become compensable prior to a loss of wages. In view of the plain language of the Act which makes wage-earning capacity the test of disability, rather than loss of wages, and the many cases which have so construed the Act (*Hartford Accident & Indemnity Co.* v. *Hoage*, 85 F. 2d 420 (C.A.D.C.); *Flores* v. *Bay Ridge Operating Co.*, 131 F. 2d 310 (C.A. 2); *Luckenbach S.S. Co.* v. *Norton*, 96 F. 2d 764 (C.A. 3); *Burley Welding Works* v. *Lawson*, 141 F. 2d 964 (C.A. 5); *Twin Harbor Stevedoring & Tug Co.* v. *Marshall*,

Respondents argue that the claimants' earning capacity had in fact been reduced, and that claims for compensation therefore arose, long prior to any loss of wages. It is asserted that the full wages paid to the employees following their accidents were not wages earned by them but were charitable gifts paid, in part, because of the exceptional consideration of their sympathetic employers. But the question of wage-earning capacity is one of fact to be determined by the Deputy Commissioners (Section 8(h)). Cf. *Hartford Accident & Indemnity Co.* v. *Hoage*, 85 F. 2d 420, 423 (C.A.D.C.); *Flores* v. *Bay Ridge Operating Co.*, 131 F. 2d 310, 311 (C.A. 2); *Luckenbach S.S. Co.* v. *Norton*, 96 F. 2d 764, 765 (C.A. 3); *Burley Welding Works* v. *Lawson*, 141 F. 2d 964, 966 (C.A. 5); *Twin Harbor Stevedoring & Tug Co.* v. *Marshall*, 103 F. 2d 513, 515 (C.A. 9).

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103 F. 2d 513 (C.A. 9)), we do not believe the findings of the Deputy Commissioners can be so read.

In any event, if we are mistaken in our reading of those findings, it plainly was reversible error for the district court not to remand the cases to the Deputy Commissioners for further findings instead of reappraising the evidence itself and making its own independent findings on this critical point. See *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469; *Marshall* v. *Pletz*, 317 U. S. 383. Accordingly, if this Court should be of the view that the Deputy Commissioners failed to make the necessary findings on loss of wage-earning capacity, the cases should be remanded to them for further findings and an order in accordance with the law as declared by this Court. If the Deputy Commissioners can make the necessary findings on the present record, they should do so; if not, further hearings should be held. Cf. *Panama Mail S.S. Co.* v. *Vargas*, 281 U. S. 670, 672.

And the implicit findings of the Deputy Commissioners that no impairment of earning capacity occurred prior to loss of wages must be accepted if supported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469; *Marshall* v. *Pletz*, 317 U.S. 383.

The undisputed evidence reveals that each of the employees, following his accident, returned to his employment at his former wages. Under the Act, such actual earnings were *prima facie* evidence of their earning capacity. Section 8(h) provides that, in cases of partial disability such as are here involved, the "wage-earning capacity of an injured employee * * * shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." It is true that the employees were given lighter work by their employers on the advice of their physicians. But the Act does not provide that an employee is disabled merely when he is physically incapable of performing every part of his prior duties; he must be incapable of earning his former wages "in the same *or any other* employment."[29] And there is nothing in the record to

[29] In contrast to the present provision of the Act defining disability in terms of incapacity to earn the wages which the employee was earning at the time of injury in the same *or any other* employment, the original form of S. 3170 provided that (Sec. 2(2)) "'Disablement' means disablement from

show that the wages the employees received for such lighter work were not the customary wages for such lighter work, or that the employees did not fully earn the wages paid for such lighter work. Indeed, in the case of Manos, the record shows that, after his job was terminated because of a general reduction in employment at the shipyard, he was able to obtain another job doing such lighter work (shop welding rather than welding aboard ship) at a slightly higher wage rate (MR. 29). Nor is there any evidence in the record that the employees knew, or had reason to know, that their earning capacity was less than the wages they were receiving. [30] In none of these three cases did the employer

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earning full wages at the work at which the employee was last employed." See Hearings, Senate Subcommittee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., p. 1.

[30] That the employees knew they had been physically injured, were suffering pain, and performed their duties with some difficulty, is irrelevant. As previously noted, no provision is made in the Act for compensation for mere pain and suffering. Since the employees continued to receive their former wages, and in the absence of evidence that they did not fully earn those wages, it was entirely reasonable for them to believe that their earning capacity had not been impaired prior to a loss of wages, and that, prior to that time, they had no claims for compensation for disability. Cf. *Urie* v. *Thompson*, *supra*. In this respect, the decisions of the Courts of Appeals for the Third and District of Columbia Circuits to which we have previously adverted (*Di Giorgio Fruit Corp.* v. *Norton*, 93 F. 2d 119 (C.A. 3), certiorari denied, 302 U. S. 767; *Potomac Electric Power Co.* v. *Cardillo*, 107 F. 2d 962 (C.A.D.C.); *Great American Indemnity Co.* v. *Britton*, 179 F. 2d 60 (C.A.D.C.)) present a close analogy. Although in those cases, as respondents point out, the injuries were latent, while in the instant case they were patent, the underlying problem was the same, *i.e.*, whether the period

allege, or offer to prove, that the employee had been kept on at his former wages solely because of the sympathetic or charitable attitude of the employer, and that the employee had been advised of that fact.[31] We submit, therefore, that the record fully supports the Deputy Commissioners' findings that these claims were timely filed.

2. *Shallat.*

Unlike the preceding cases, the case of Shallat involves a schedule loss under Section 8 of the Act. Shallat injured his left hand on November 21, 1947, while employed as a stevedore. He sustained a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. He lost no

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of limitation should be permitted to run before the employee knew, or should have had reason to know, that a claim for compensation for disability had accrued.

[31] If the employees had been so advised, timely claims for compensation would presumably have been filed upon the receipt of such knowledge. It is clear that if the employees had filed claims shortly after the accidents, and had shown loss of *wage-earning capacity* at that time, the Deputy Commissioner could have awarded compensation. *Twin Harbor Stevedoring & Tug Co.* v. *Marshall*, 103 F. 2d 513, 515 (C.A. 9).

It is to be observed, however, that, in such cases, the act permits the employee to recover compensation in full notwithstanding the fact that the employer has charitably continued to pay him his old wages. Cf. *Twin Harbor Stevedoring & Tug Co.* v. *Marshall*, *supra*; *Hartford Accident & Indemnity Co.* v. *Hoage*, 85 F. 2d 420 (C.A.D.C.). This circumstance makes it unlikely that the employees here were kept on at their former wages solely because of the charitable attitude of their employers. If charity did extend so far, we think it strange that the point was not raised at the hearings before the Deputy Commissioners.

time as a result of the accident and continued at the same employment, presumably at the same wages. According to his testimony, his hand pained him considerably, and he applied self-treatment. The pain progressively became more severe, and he filed a claim for compensation on May 23, 1949, eighteen months after the accident. Upon this evidence, the Deputy Commissioner found that Shallat had not sustained any temporary disability, and thus had not become entitled to compensation until the condition of his left second finger reached a permanent stage and became a permanent disability. He further found that Shallat sustained a permanent disability amounting to loss of 50 per cent of the use of his finger within one year prior to the filing of his claim, and held that the claim is not barred by limitations (SR. 6).[32]

Accordingly, the only factual questions presented with respect to Shallat's claim are: (i) whether the Deputy Commissioner erred in finding the absence of any temporary disability, and (ii) whether the Deputy Commissioner erred in finding that Shallat's permanent disability became fixed within one year prior to the filing of the claim.

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[32] Section 8(c)(9) provides for payment of 66⅔ per cent of the average weekly wages for eighteen weeks for loss of the second finger. Section 8(c)(19) provides that "compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." Since Shallat's average weekly wages were $90.00 (SR 6), and since he sustained only a 50 per cent loss of use of his second finger, he was awarded compensation for nine weeks at $25.00 per week (SR 6-7).

If Shallat had been temporarily disabled, a claim for compensation would have arisen prior to the time his permanent disability became fixed. If such temporary disability accrued more than one year prior to the filing of his claim, it might be argued that the claim for permanent disability would be barred by limitations.[33] On this record, however, no such contention can properly be made. As previously noted, *supra*, p. 49, the actual earnings of an employee are *prima facie* evidence under the Act of his earning capacity, and there is no evidence here to rebut this presumption. The record shows, without contradiction, that Shallat lost no time as a result of the accident and continued at the same employment, presumably at the same wages (SR. 24-25). That he performed his work with some difficulty and pain does not, of course, mean that he had a claim for compensation for disability, in the absence of any showing of impairment of wage-earning capacity.

The Deputy Commissioner's finding that Shallat did not permanently lose 50 per cent of the use of his left second finger until within one year of the filing of the claim is similarly supported by substantial evidence on the record as a whole. The only evidence to the contrary is Shallat's statement at the beginning of his testimony that "the left hand is still the same as it was when I got injured."

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[33] But see note 13, *supra*, p. 33).

(SR. 27). However, Shallat further testified that he had not filed a claim earlier because "I thought it wasn't so serious. I thought it would work its way out. I took it upon my own. I thought it would gradually work itself out." (SR. 28). He first raised a question about his claim on March 11, 1949 (the accident occurred on November 21, 1947), because "it was getting more and more severe. * * * It got to the point it was too severe for me and I couldn't figure out what should be done." (SR. 28). And when asked by respondents' counsel why he had applied self-treatment instead of filing for medical benefits, Shallat replied that "I didn't think it serious. * * * I thought it wasn't so serious until it gradually proved itself serious." (SR. 29-30). Finally, the report of the physician who examined him four days after the accident reveals that the physician was, at that time, of the opinion that the injury would not result in a permanent defect (SR. 32). This is more than substantial evidence that the disability occurred within a year prior to May 23, 1949 (when the claim was filed). We submit, therefore, that the Deputy Commissioner's finding that Shallat's claim for a schedule loss was timely filed must be accepted. *O'Leary* v. *Brown-Pacific-Maxon, supra; Cardillo* v. *Liberty Mutual Ins. Co., supra; Marshall* v. *Pletz, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

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NOVEMBER 1951.

APPENDIX

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended (44 Stat. 1424, 48 Stat. 806, 52 Stat. 1164, 62 Stat. 602, 33 U.S.C. 901 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

* * * * *

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (in-

cluding any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

* * * * *

SEC. 4. (b) Compensation shall be payable irrespective of fault as a cause for the injury.

* * * * *

SEC. 6. (a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in section 7: *Provided, however,* That in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

* * * * *

SEC. 7. (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require. * * *

* * * * *

SEC. 8. Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof

shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * * * *

(9) Second finger lost, eighteen weeks' compensation.

* * * * *

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * *

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between

the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

* * * * *

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * * * *

SEC. 13. (a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim there-

for is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

* * * * *

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Administrator at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by

any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

* * * * *

(d). Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

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